Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1315

LLOYD L. LINDSEY, et. al.,

Petitioners

versus

STATE OF LOUISIANA THROUGH THE SABINE RIVER AUTHORITY,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on December 17, 1975.

[1] Petitioners herein are Lloyd L. Lindsey, Ruth Rhodes Lindsey, Velma D. Dunn, Edward L. Dunn, and Rolfe H. McCollister.

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CITATIONS TO OPINIONS BELOW

The report of the Sabine River Land Authority Commission is unreported and is printed in Appendix B hereto, *infra*, p. 44. The opinion, nunc pro tunc, of the special master is unreported and is printed in Appendix B hereto, *infra*, p. 42. The opinion of the District Court, printed in Appendix B hereto, *infra*, p. 38, is unreported. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p 21, is reported at 524 F.2d 934.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on December 19, 1975, and a copy thereof is appended to this petition in Appendix B at p. 21. The jurisdiction of this Court is invoked under 28 U.S.C. 1245(1).

QUESTIONS PRESENTED

The questions presented are:

1. Whether a Federal District Court has jurisdiction to entertain a suit, brought by a state licensee of the Federal Power Commission, seeking to condemn privately owned lands, located wholly within the borders of the state, for purely recreational purposes.

2. Whether an award of timberland value for property which a landowner had, in good faith, purchased at then current commercial lakefront prices (said award being a mere fraction of the fair market value of the property based

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upon the property's highest and best use at the time of the taking), is a confiscation of private property without just compensation, and thus a violation of the fundamental protections afforded private citizens by the Fifth Amendment to the United States Constitution.

3. Whether the Public Records Doctrine of the State of Louisiana affords protection to a purchaser of land adjacent to a then existing dam and reservoir project, whose land is subsequently condemned for recreational purposes, where there has been neither publication nor public notice of an impending expropriation.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision involved is the Fifth Amendment, United States Constitution. The statutes involved are the pertinent sections of the Federal Power Act, 16 U.S.C.A. § 803(a), 16 U.S.C.A. § 814, and Louisiana Revised Statute, 9:2721.

STATEMENT

On July 3, 1968, the State of Louisiana, through the Sabine River Authority (SRA), filed suit to expropriate, from petitioner landowners, 18.28 acres of land located adjacent to the Toledo Bend Dam and Reservoir Project. In addition, the SRA sought expropriation or recovery of 8.94 acres of land subject to a "Leaseback" agreement granted in favor of the vendors of petitioners and assigned by petitioners' vendors to petitioners. The jurisdiction of the District Court was invoked on the ground that the case arises under the Federal

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Power Act. The relevant facts precedent to the filing of the suit in expropriation are as follows:

On July 6, 1961, a basic contract was entered into between the Sabine River Authorities of Texas and Louisiana to construct the Toledo Bend Dam and Reservoir. On that same date a separate agreement was entered into between the Louisiana Authority (Authority) and the engineering firm of Barnard & Burk for the purposes of advising the Authority on the potential location and development of recreational sites along the reservoir. Barnard & Burk subsequently reported "Seventeen possible sites that could be used for recreational purposes," and on November 3, 1961 submitted a "preliminary" map showing those sites. During the following year, Barnard & Burk continued making plans for sites and determined that two of the previously recommended sites were not suitable. On July 10, 1962, further maps were submitted showing "recommended sites and alternates," which were approved for further consideration by the Authority on August 14, 1962. During the early portions of 1963 a committee was appointed by the Authority to "study the acquisition and development of recreation sites," and Barnard & Burk was instructed to make "site inspections and further recommendations." On July 3, 1963, the Authority began to make the first acquisitions for the actual Dam site, and shortly thereafter the first prints of shoreline survey maps were sent to Barnard & Burk for their use in developing "more accurate plans." On March 11, 1964 Barnard & Burk submitted "recommendations" on the selection of recreational sites and on the next day the first monies were appropriated for recreational purposes. On April 16, 1964, the Authority authorized the hiring of an appraiser for the recreational sites and the

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attorney for the Authority was "authorized" to file expropriations suits "where necessary." On September 28, 1964, the Toledo Bend Joint Operation (the combined Authority of Texas and Louisiana) submitted an application to the Federal Power Commission for **approval** of the recreation use plan. On November of that same year, the Federal Power Commission requested additional information. Subsequent to the request for additional information, the Toledo Bend Joint Operation submitted Supplement No. 1 of the "report on master plan for recreational development: to the Federal Power Commission on June 8, 1865. On May 19, 1966 the Toledo Bend Joint Operations filed "site development drawings." On April 21, 1967, some two and one-half years after the submission of the original plan, the Federal Power Commission **approved** the recreational sites plan, and subsequently, on May 10, 1967, the Sabine River Authority of Louisiana voted to adopt nineteen recreational sites.

On or about August 15, 1967, Petitioners were informed of various tracts of land, located on the shoreline of the Toledo Bend Reservoir, which were being offered for sale by a representative of the Merrit Estate. Being interested in the commercial development of lakefront property of this nature, Appellants approached R. D. Morgan (Project Supervisor for Engineering of the Toledo Bend Project), on or about August 16, 1967, for the purpose of obtaining maps of the property being offered by the Merritt Estate. Mr. Morgan made no mention whatsoever of recreation sites when he gave the requested map to Appellants, nor did the map reflect recreation sites. Petitioners subsequently viewed the land and entered into a Purchase Agreement signed by Petitioners on September 2, 1967. At this point in time, there was nothing

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in the public records of the Parish of Sabine that would inform Petitioners, nor were the representatives of the Merrit Estate (Petitioners' predecessor in title) informed, of the possibility that the land in question would be condemned for recreational purposes. On September 7, 1967, Petitioners again approached Mr. R. D. Morgan, asked him for additional maps of the land in question, and informed him that they were legally bound to purchase the property. Mr. Morgan then gave Petitioners a "new" map which disclosed that the land in question was included within a proposed recreational site. Petitioners, subsequently, requested, and were not given, official notice of the impending condemnation of the property. Pursuant to the obligations incurred under the above mentioned purchase agreement entered into by Petitioners on September 2, 1967, and upon payment by Petitioners of more than $1,000.00 per acre, title passed to petitioners on, or about, February 24, 1968, and Petitioners subsequently informed Mr. Morgan of their intention to commercially develop the property. On May 22, 1968, Petitioners received the **first official notice** that their property would be condemned. Petitioners refused to sell their property to the State of Louisiana (for a price **far below** what appellants had paid for the land, and certainly far below the fair market value based on the land's highest and best use). The State of Louisiana, through the Sabine River Authority, subsequently filed suit in expropriation on July 3, 1968.

After a hearing in which the Petitioners' opposition to the validity of taking was overruled, the District Court referred the issue to a 3-man commission, with a special master as chairman. The Commission issued its report, finding that the expropriation of land for Recreation Site 9, in which Peti-

tioners' land was situated, **was all part of the original Toledo Bend Dam and Reservoir Project** and that the Petitioners were not therefore entitled to any enhancement in value attributable to the construction of the Toledo Bend Dam and Reservoir. In spite of the fact that Petitioners had paid commercial lakefront prices for their land, the commission valued the land at $2,430.54 by virtue of a best and highest use as timberland, and Petitioners were taxed with the cost of the proceedings, in excess of $5,000.00.

Petitioners subsequently filed objections to the findings of the Commission and Special Master and obtained an order to stay further proceedings in the District Court, pending a ruling by the State Court on the same issue of law. The determination of law was not had in the state courts, apparently because other pending cases were settled, therefore the District Court recalled its stay order and heard argument on the objections to the commission's findings. On May 9, 1974, the District Court accepted the findings of the Commission and Special Master and rendered judgment for the plaintiff.

On appeal, the Court of Appeals affirmed. The court dealt at length with the jurisdiction issue in reaching the conclusion, based upon policy considerations, that recreational areas are properly considered as "appurtenant or accessory" to a dam and reservoir for the purposes confering jurisdiction upon a licensee, pursuant to 16 U.S.C. 814, to condemn lands in fee for recreational areas in a federal district court. The court next considered the issue of whether the taking of Petitioners' property for the construction of Recreational Site 9 was a part of the original Toledo Bend Dam and Reservoir Project or a distinct and separate project. The court

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examined the "scope of the project" test, as first stated by the Supreme Court in *United States v. Miller*, 1943, 317 U.S. 369, 63 S.Ct. 276, 281 L.Ed. 336, and later "refined" in *United States v. Reynolds*, 1970, 397 U.S. 14, 90 S.Ct. 803, 25 L. Ed. 2d 12, and determined that Petitioners were not entitled to any enhancement of value caused by the construction of the dam and reservoir on the ground that the taking of Petitioners' lands was "probably" within the scope of the original Toledo Bend Dam and Reservoir Project. The court then went on to consider the issue of whether Petitioners were entitled to rely upon the Louisiana Public Records Doctrine, L.S.A.R.S. 9:2721, for the proposition that one who, upon faith on the public records, purchases real estate, the record title to which stands in the name of his vendor, is entitled to be protected in his purchase against any claims arising outside the public records. The court refused to recognize the applicability of the Louisiana Public Records Doctrine to condemnation proceedings on the reasoning that the above doctrine only applies to the acquisition of "clear title" to immovable property. The court concluded that Petitioners' "claim against the SRA has nothing to do with title to the land but only with the price they received for it."

REASONS FOR GRANTING THE WRIT

1. The decision below should be reviewed because it erroneously, and for the first time, interprets Section 21 of the Federal Power Act, 16 U.S.C.A. § 814, *infra*, p. 19, as to confer a federal district court with jurisdiction over the subject matter of a lawsuit instituted by a state, as licensee of the Federal Power Commission, seeking to condemn privately owned property within the borders of that state for

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purely recreational purposes, that property being adjacent to a dam and reservoir site previously acquired by the state.

By virtue of its adoption of a broad and liberal interpretation of the jurisdictional statement contained in 16 U.S.C.A. § 814, the decision below is an infringement upon the traditional principles of "separation of powers" and an intrusion into an area which has heretofore been reserved to the states. The decision below is thus in direct conflict with the following principles set forth by this court in *Healy v. Ratta*, 292 U.S. 263, 270, 54 S.Ct. 700, 703 (1934):

> "The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution . . . Due regard for the rightful independence of state governments, which should actuate federal courts, **requires that they scrupulously confine their own jurisdiction to the precise limits which (a federal) statute has defined.**" (Emphasis Added). See also *Thomson v. Gaskill*, 315 U.S. 442, 446, 62 S.Ct. 673, 675.

This court has addressed the issue of jurisdiction as regards the Federal Power Act, and clearly recognized the separation of jurisdictions maintained therein:

> "In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act." *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 167, 66 S.Ct. 906, 913 (1946).

The court below essentially avoided the "separation of

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jurisdictions" issue by applying the broad **policy** considerations found in 16 U.S.C.A. § 803 (a), *infra*, p. 19, and 18 C.F.R. § 2.7, *infra*, p. 20, to the jurisdictional statement found in 16 U.S.C.A. § 814, in reaching its ultimate conclusion that "recreational areas are properly considered as 'appurtenant or accessory' to a dam and reservoir" for the purposes of jurisdiction under § 814. A close comparison of § 803 with § 814 discloses a serious flaw in the above reasoning—the former is broad in its terms while the latter is very narrowly written. The purpose of the restrictive language of § 814 is to enable a licensee to acquire, by condemnation in federal court, the lands necessary to construct that portion of the project which directly affects navigation, and hence, interstate commerce (i.e., the damsite and inundated areas), while at the same time reserving to the state courts the jurisdiction over other matters which may arise out of the project.

The holding of the court below that § 814's limited jurisdiction is modified and enlarged by the general policy statements of § 803, and 18 C.F.R. § 2.7, clearly defeats the separation of jurisdiction" policy of the Federal Power Act, as announced by this court in *First Iowa Hydro-Electric Coop. v. F.P.C.*, *supra*, and thus results in a serious encroachment upon the traditional jurisdiction of state courts over the condemnation of lands within state borders.

2. The decision below results in a confiscation of private property without just compensation, and is thus a direct violation of the Fifth Amendment to the United States Constitution. The facts are undisputed that the Petitioners herein paid commercial lakefront prices (in excess of $1,000 per acre) for their lands. The decision of the court below that

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Petitioners are entitled only to an award of mere timberland value (approximately $100 per acre) is in direct conflict with the following principles recently set forth by this court in *United States v. Reynolds*, 397 U.S. 14, 16, 90 S.Ct. 803, 805, (1970):

> "The Fifth Amendment provided that private property shall not be taken for public use without a just compensation. And "just compensation" means the full monetary equivalent of the property taken. **The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.** (Emphasis added)

The decision of the court below does not take into consideration that Petitioners are not even able to recoup what they paid for the subject property in good faith. Thus, not only have Petitioners been deprived of their property without adequate compensation but the Respondent has had the windfall bonanza of obtaining shoreline property at timberland values—a clear case of the most inequitable and unjust enrichment to Respondent, and blatantly at odds with the following criteria set forth by this court in *United States v. Fuller*, 409 U.S. 488, 490, 93 S.Ct. 801, 803, 35 L.Ed. 2d 16 (1973):

> Our prior decisions have variously defined the "just compensation" that the Fifth Amendment requires to be made when the Government exercises its power of eminent domain. The owner is entitled to fair market value, but that term is "not an absolute standard nor an exclusive method of valuation. The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law."

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The holding of the court below that Petitioners are not entitled to any enhancement of value caused by the construction of the Toledo Bend Dam and Reservoir on the ground that the taking of Petitioners' lands, for recreational purposes, was "probably" within the scope of the "original project" is in direct conflict with the leading decisions handed down by this court concerning the "scope-of-the-project test," *United States v. Miller, supra,* and *United States v. Reynolds, supra.* Further, the court below failed to follow its own correct holding in *United States v. 2,353.28 Acres of Land, More or Less, etc.*, 414 F.2d 955 (5th Cir., 1969), but rather seemed to follow the reasoning of an Eighth Circuit decision, *United States v. Crance*, 341 F.2d 161 (8th Cir., 1965), which case has been impliedly overruled, in principle, by this court in *United States v. Reynolds, supra.*

The facts of *U.S. v. 2,353.28 Acres, supra,* are important, and bear striking resemblance to the instant case. In that case, the appellant, Colton, owned a tract of land near Cape Canaveral in Florida, now Cape Kennedy. Due to the expanding needs of our country's space program, a 72,644 acre tract of land adjacent to the then Cape Canaveral was expropriated in August of 1961 for the use of the National Aeronautics and Space Administration. That initially condemned tract did not include the Colton property. More than two years later, in December of 1963, a second complaint was filed calling for the condemnation of an additional 14,800 acres which was adjacent to the original tract condemned. The Colton property was included in the new condemnation. The trial court concluded that the Colton Land was within the "scope of the project" when the original condemnation complaint was filed and that the original condemnation complaint was public notice that the Colton land probably would

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be needed as a part of the "overall project." Consequently, the trial court ruled that enhancement in value occurring subsequent to August 24, 1961 should not be considered in determining the market value of the Colton land. The Fifth Circuit, however, in reversing the trial court's ruling, held that the original complaint (filed on August 24, 1961) "did not disclose a probability that the Colton Land would be needed for the project." The court noted that the Government had taken no steps to give notice to prospective purchasers:

> "We have searched the record in vain for any Governmental action which would give notice to a prospective real estate purchaser on August 24, 1961 that the Colton Land probably would be condemned." (Id. p. 970)
>
> "We conclude from an examination of the record before us that a buyer in the real estate market reasonably could expect, prior to June 13, 1962, that the Colton Land would not become a part of the lunar landing project, but would enjoy a position proximate to the project." (Id. p. 971)

The court below, in applying the *Crance*, *supra*, criteria, failed to take into account the disastrous and far reaching effect its decision will have upon prospective purchasers of property within the vicinity of any public improvement. In *Crance*, *supra*, the court was faced with similar facts as the instant case, the expropriation of lands abutting a dam and reservoir for recreational purposes. The court therein found that the government's taking of recreational sites which had not been proposed at the outset of the project was still probably within the scope-of-the-project and therefore, the landowner was not entitled to any enhancement. The court, in *Crance*, *supra*, stated:

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> The significant factor here is that this project contemplated recreational areas from its very inception and certainly property lying beyond a perimeter of the reservoir would probably be incorporated for recreational purposes if the land acquired for the reservoir alone was not also sufficient for recreational utilization. Since the Crance property abutted the reservoir line, it was within the sphere of probable acquisition for recreational use.

The effect of the holding in *Crance, supra*, is that all property within the proximity of a dam and reservoir project will be taken out of commerce until some undeterminable time in the future (as long as 10 years in the instant case, according to the FPC license), and that prospective purchasers and sellers of such property will be unable to ascertain the fair market value thereof, with any degree of certainty.

Notwithstanding the Court of Appeals' disclaimer that it does "not necessarily adopt the rather broad statement in *Crance* that property for a recreational site would be within the scope of the project simply because it abutted the reservoir line," the end result of the decision is that vast tracts of shoreline property abutting the Toledo Bend Dam and Reservoir have been taken out of commerce without even a semblance of fair notice to landowners and prospective purchasers. **The failure of the Court of Appeals to recognize that Recreational Site 9 is a separate and distinct project from the original Toledo Bend Dam and Reservoir Project[2] is in**

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[2] In addition to the particular facts and equities involved in the instant case, it must be recognized that the Toledo Bend Dam and Reservoir was **by definition** a separate and distinct project from the recreational project. Petitioners refer to Section 1.7 of the "Basic Contract" between the Sabine River Authority of Texas and the Sabine River Authority of Louisiana:

> "'Project' when hereinafter referred to shall mean the Toledo Bend Dam, spillway, power plant facilities and necessary lands, and all related facilities, materials and equipment set forth in the 'feasibility

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direct conflict with "the basic equitable principles of fairness" and the "technical concepts of Property law." *United States v. Fuller, supra.*

3. The decision of the court below, in denying Petitioners the right to avail themselves of the Public Records Doctrine of the State of Louisiana is in direct conflict with the substantive laws of Louisiana. The Public Records Doctrine, L.S.A.R.S. 9:2721, *infra*, p. 20, provides the fundamental concept protecting title to immovable property:

> "No sale, contract, counterletter, lien, mortgage, judgment, surface lease . . . or other instrument of writing relating to or affecting immovable property shall be binding on or affect third persons or third parties unless and until filed for registry in the office of the parish recorder of the parish where the land or immovables is situated; and neither secret claims or equities nor other matters outside the public record shall be binding on or affect third parties."

The landmark case of *McDuffie v. Walker*, 51 So. 100, decided in 1909, was the beginning of a doctrine that has been followed consistently up to the present and this doctrine has never been overruled or reversed, but has been even broadened by later cases. *McDuffie v. Walker* holds that one who, upon faith on the public records, purchases real estate, the record title to which stands in the name of his vendor, is entitled to be protected in his purchase against any claims or equities arising out of relations outside of the public records. In fact

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study,' and as hereinafter more specifically defined from time to time by mutual agreement of the authorities. **It is expressly provided, however, that 'project' shall not include any recreational facilities or recreational benefits incidental to the construction and operation of said Toledo Bend Dam and Reservoir.**" (Emphasis added).

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actual knowledge that the record owner of the property is not the true owner does not prevent the public records doctrine from controlling. In *Kinchen v. Kinchen*, 244 So. 2d 316 (La. App. 1st Cir., 1970, writ refused, 1970), the Court held that a third party purchaser of real property, who relied on the public records doctrine, was in "good faith" (in the absence of fraud) in spite of any independent nowledge of an existing infirmity. The Court expounded at p. 318:

> "The rule in McDuffie is based on the fundamental premise that public policy requires stability in the titles to real property to the end that marketability thereof will not be impaired and property **not be taken out of commerce.** To achieve this goal, the law prescribes **one test** for the marketability of real property, namely, the public records. With this concept in view, our jurisprudence establishes that acquisition of clear title to immovable property can be defeated only by knowledge afforded by the public records or by a successful proferred allegation of fraud. (Emphasis added.)

The public records doctrine, then, is intended to protect property owners from having their property "taken out of commerce," as was done to petitioners (as well as to all property owners with lands fronting on the Toledo Bend Reservoir) in the instant case. The court below sought to avoid the question raised by L.S.A.R.S. 9:2721 by placing undue emphasis upon the phrase "stability in the titles" contained therein. The court's statement, at page 943, that "the question is not whether [Petitioners'] title can be defeated . . . the only question is whether [Petitioners] were given 'just compensation,'" fails to recognize that the very purpose of L.S.A.R.S. 9:2721 is to **insure that the marketability of immovable property will not be impaired nor will property be taken out of commerce.**

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The court's statement that Petitioners' "claim" against the SRA has nothing to do with title to the land but only with the price they received for it," is anomalous when one considers the statement made by the court in footnote 10, page 943, to the effect that Petitioners' vendors could not have delivered "good and merchantable title" pursuant to the purchase agreement entered into between the parties. The court is saying on the one hand that Petitioners had "good title," thus denying them the protection afforded by L.S.A.R.S. 9:-2721; on the other hand, the court is saying that Petitioners should never have purchased the property in the first place because Petitioners' vendors were unable to deliver good title; yet there was no notice to Petitioners, either in fact or on the Public Records, as of September 2, 1967, the date Petitioners became bound. Such reasoning by the court below has only served to cloud the issue. The simple fact is that the decision by the court below has effectively taken vast tracts of land out of commerce and has denied these Petitioners, and all other owners and purchasers of immovable property within the State of Louisiana, the fundamental protections provided by the Public Records Doctrine.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,
Original Signed By
JAMES S. HOLLIDAY, JR.

JAMES S. HOLLIDAY, JR.
Attorney for Petitioners
Post Office Box 2706
Baton Rouge, Louisiana 70821

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Certiorari have been forwarded by mail, postage prepaid, to Mr. Chris Smith, III, Attorney for Respondent, P. O. Box 1528, Leesville, Louisiana, 71446, this 12 day of March, 1976.

Original Signed By
JAMES S. HOLLIDAY, JR.

James S. Holliday, Jr.
Attorney for Petitioners

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APPENDIX A

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

U.S. Constitution, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

16 U.S.C.A., Section 803(a):

"That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the projects before approval.

16 U.S.C.A., Section 814:

"When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion

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structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts."

18 C.F.R., Section 2.7:

"(a) To acquire in fee and include within the project boundary enough land to assure optimum development of the recreational resources afforded by the project. To the extent consistent with the other objectives of the license, such lands to be acquired in fee for recreational purposes shall include the lands adjacent to the exterior margin of any project reservoir plus all other project lands specified in any approved recreational use plan for the project.

"(b) To develop suitable recreational facilities upon project lands and waters and to make provisions for adequate public access to such project facilities and waters and to include therein consideration of the needs of physically handicapped individuals in the design and construction of such project facilities and access."

Louisiana Revised Statutes, 9:2721:

No sale, contract, counter letter, lien, mortgage, judgment, surface lease, oil, gas or mineral lease or other instrument of writing relating to or affecting immovable property shall be binding on or affect third persons or third parties unless and until filed for registry in the office of the parish where the land or immovable is situated; and neither secret claims or equities nor other matters outside the public records shall be binding on or affect such third parties.

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APPENDIX B

524 F.2d 934

STATE OF LOUISIANA, Through the
SABINE RIVER AUTHORITY,
Plaintiff-Appellee,

versus

LLOYD L. LINDSEY, et al,
Defendants-Appellants.

No. 74-2637.

United States Court of Appeals, Fifth Circuit.

Dec. 17, 1975.

Appeal from the United States District Court for the Western District of Louisiana.

Before COLEMAN and GEE, Circuit Judges, and COX,* District Judge.

COLEMAN, Circuit Judge.

The District Court adopted the findings of a commission and of a special master, in eminent domain, that the appellant landowners were not entitled to enhancement of the value of their land due to the construction of the Toledo Bend Dam and Reservoir. The issues on appeal are: (1) whether the District Court properly had jurisdiction to hear the expropriation suit; (2) whether the condemnation of Recreational Site #9 was within the scope of the original Toledo Bend Dam and Reservoir Project; and (3) whether the appellants were entitled to rely on the Louisiana public records doctrine for notice that their land lay within a recreational site.

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* Of the Southern District of Mississippi, sitting by designation.

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We find that appellee is entitled to prevail on all three issues and therefore affirm the Judgment of the District Court.

FACTS

On July 3, 1968, the State of Louisiana, through the Sabine River Authority (SRA), filed suit to expropriate, from the appellant landowners, various tracts of land lying within the vicinity of the Toledo Bend Dam and Reservoir Project. After a hearing in which the appellants' opposition to the validity of the taking was overruled, the District Court, Rule 71A F.R.Civ.P., referred the issue of just compensation to a 3-man commission, with a special master as chairman. The Commission issued its report, finding that the expropriation of land for Recreation Site # 9, in which appellants' land was located, was all part of the *original* Toledo Bend Dam and Reservoir Project and that the appellants were not therefore entitled to any enhancement in value attributable to the construction of the Toledo Bend Dam and Reservoir. The land was valued at $2,430.54 by virtue of its best and highest use as timberland, and appellants were taxed with the cost of the proceedings, in excess of $5,000.

Subsequently, the appellant landowners filed objections to the findings of the Commission and Special Master and obtained an order to stay further proceedings in the District Court, pending a ruling by the State Court on the same issue of law. The elapse of two years brought forth nothing from the State Court, so the District Court recalled its stay order and heard argument on the objections to the Commission's findings. On May 9, 1974, the District Court accepted the findings and conclusions of the Commission and Special Master and rendered judgment for the plaintiff. The landowners appeal.

In 1950 the Sabine River Authority of Louisiana was created by legislative act. Following feasibility studies throughout the 1950's, the SRA of Louisiana and the SRA of Texas

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on July 6. 1961 entered into a basic contract to construct the Toledo Bend Dam and Reservoir. About a week later the engineering firm of Barnard & Burk was employed for the purpose of advising the SRA on the location, acquisition and development of recreational sites. Following inspection of the area, Barnard & Burk on November 3, 1961, submitted a preliminary map showing 17 selected recreational sites. After further study and planning, the SRA on August 14, 1962, approved the sites recommended by Barnard & Burk. On July 3, 1963, the SRA began acquiring land at the dam site, and shortly thereafter the first prints of shoreline survey maps were sent to Barnard & Burk for their use in developing more accurate plans. On March 11, 1964, $125,000 was advanced to apply for planning and acquisition of recreational sites and some land for one of the sites was obtained by voluntary acquisition later that year. On September 28, 1964, the Toledo Bend Joint Operation (SRA of Louisiana and SRA of Texas combined) submitted an application to the Federal Power Commission for approval of the recreational use plan. After requesting additional information, the Federal Power Commission, on April 21, 1967, approved the recreational sites plan and 19 sites were adopted by the SRA, May 10, 1967.

In August of 1967, the appellants became interested in land in the Toledo Bend area for commercial development as lakefront property. Appellants contacted R. D. Morgan (Project Supervisor for Engineering of the Toledo Bend Project) and obtained a map of the area surrounding the land in question. The map did not disclose that the land in question lay in a recreational site. On September 2, 1967, appellants signed a "Purchase Agreement," contingent on the vendor delivering a good and merchantable title. On September 7, 1967, the appellants acquired a new map from Mr. Morgan which disclosed that the land in question was included within a proposed recreation site and appellants were specifically informed of this fact by Mr. Morgan. The land was paid for and title passed to apppellants on February 24, 1968. The appellants were of-

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ficially informed on May 22, 1968, that their property would be condemned for use as a recreational site, and on July 3, 1968, the suit in expropriation was filed.

JURISDICTION

Since there is no diversity of citizenship in this case, and the United States is not a party, jurisdiction, if present, will have to be found within the confines of the Federal Power Act.[1] We raised the question of jurisdiction during the oral argument of this case and requested the parties to submit concurrent briefs on the issue. The appellee, SRA, contends that jurisdiction is present under 16 U.S.C., § 814 since a recreational site should be considered a work "appurtenant or accessory" to the dam, reservoir and diversion structure desirable for the benefit of interstate commerce. On the other hand, the appellant landowners contend that jurisdiction is lacking, arguing that 16 U.S.C., § 814 enables a licensee only to acquire, by condemnation in federal court, the lands necessary to construct that part of the project which directly affects navigation, and hence, interstate commerce, *i.e.*, the dam site and inundated areas. They contend that condemnation of any other lands involved in the project is reserved to the "traditional jurisdiction" of the state courts.

Title 16 U.S.C.A., § 814, upon which the SRA relies for jurisdiction, reads as follows:

> When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may ac-

[1] 41 Stat. 1063, as amended, 16 U.S.C., §§ 791a-828c.

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> quire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

While not directly on point with the instant case, several cases have discussed the purview of § 814. In *Feltz v. Central Nebraska Public Power & Irr. Dist.*, 8 Cir., 1942, 124 F.2d 578, the licensee was seeking to condemn lands away from the dam and reservoir in order to relocate a United States highway which was to be inundated by the reservoir. The Court held that jurisdiction was proper stating:

> It is apparent that there are no words of the statute which relate in express terms to the problem presented when the development of a project necessitates the removal of such utilities as railroads, highways, streets, or alleys that lie within the project area and the relocation of the same outside of the project area where their use and service to the public may be continued.
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> * * * * * * *
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> It must be conceded that there are situations in which an attempted taking of land may be too remote from the scope of an authorized improvement to be sustained. But in this case we think it resulted from the public interest involved in the maintenance of the public highway as a part of the Highway System of the United States and the public interest in the development of the power and irrigation improvement that the work of highway relocation aided and contributed in a secondary way and was "accessory" and "in conjunction with" the District's improvement and the District's power to condemn must be sustained . . . . . 124 F.2d at 582.

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The case of *Chapman v. Public Utility Dist. No. 1 of Douglas Co., Wash.*, 9 Cir., 1966, 367 F.2d 163, involved a Federal Power Commission Licensee who was constructing a hydro-electric project on the Columbia River, totally within the State of Washington. The licensee sought to condemn fee simple title to two tracts of land which lay along the boundary of the project, some of the land being above the maximum pool elevation of the reservoir. The landowner opposed the condemnation on the ground that since some of the land lay above the shoreline of the pool at maximum depth, a flowage easement would fully satisfy the purposes of the licensee and condemnation in fee was therefore unnecessary. The Court held that the licensee had power to condemn in fee the land in question by virtue of 16 U.S.C., § 814. While *Chapman* dealt primarily with the issue of the necessity of taking a fee as opposed to an easement, the fact remains that it was a suit to condemn lands outside of the dam site and reservoir which was maintained in a federal forum by virute of § 814. The reasoning used by the *Chapman* Court in determining that the licensee had a right to take a fee interest was, *inter alia*, that the recreational requirements imposed on the licensee required it to exercise control over lands adjacent to the reservoir rim.

The question before the *Court of Oakland Club v. South Carolina Public Service Authority*, 4 Cir., 1940, 110 F.2d 84, was whether the licensee could condemn in fee lands for the reservoir (not dam site) and a strip of land 100 feet above the high water mark of the reservoir. The condemnee maintained that the condemnor had no authority under 16 U.S.C., § 814 to take by condemnation a fee simple title to any property except an unimproved dam site, and as to any other property it was authorized by § 814 to take only "the right to use or damage the lands." The Fourth Circuit responded by saying "we are satisfied that the Federal Power Act does not restrict the condemnor to the rights and powers of eminent domain specifically enumerated in the Federal Power Act," 110 F.2d

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at 86. The Court went on to say that the licensee could take advantage of the broader powers allowed under the state law which unquestionably allowed condemnation in fee. They quoted with approval the lower court's holding that § 814 was not an exclusive law of eminent domain but enabled the licensee to exercise in the federal courts the substantive rights granted under state law. Concerning the construction of the Federal Power Act the Court stated:

> The Federal Power Act came to fulfill, not to destroy. It is a remedial statute enacted by the Federal Congress in favor of licensees under the Act. And in statutes of this character, the great dictum of St. Paul: "The letter killeth but the spirit giveth life," seems peculiarly applicable. 110 F.2d at 86.

Again, the situation in *Oakland* did not involve the precise issues that are presented by the instant case but it is important for two reasons. First, a suit was maintained in federal court for condemnation of lands not within the reservoir's inundated area. Secondly, the Court enunciated an interpretation of the Federal Power Act according to its purpose rather than a strictly *literal* interpretation.

The appellant landowners do not question this Court's jurisdiction to entertain expropriation suits to condemn lands "necessary to the construction, maintenance, or operation" of the dam site or reservoir. They do insist, however, that a federal court lacks jurisdiction to try a suit to condemn lands to develop recreational sites that are totally apart from the dam site and reservoir. The landowners' argument is predicated on a narrow reading of § 814 which they maintain requires that before jurisdiction is conferred on a federal court, the proposed improvement must be "for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce." They then imply that only that part of the project which directly affects

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navigation can affect interstate commerce.[2] Following through, the landowners contend that the proposed recreational sites do not aid or improve navigation, hence they do not affect interstate commerce and therefore, do not come within the ambit of federal jurisdiction.

A careful reading of 16 U.S.C., § 814 does not support such an interpretation. The pertinent portions of § 814 read as follows:

> When any licensee cannot acquire by contract . . . the right to use or damage the lands . . . necessary to the construction . . . of any dam [or], reservoir . . . or the works appurtenant or accessory thereto, in conjunction with an improvement which . . . is . . . for the purpose of improving . . . a waterway . . . for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States . . . or in the State courts. . . .

Rephrased the statute simply means that the licensee has the power of eminent domain in federal court to obtain the right to "*use or damage*" any land necessary to the construction of any works "*appurtenant or accessory*" to a dam or reservoir which is connected with a waterway improvement that the commission has found to benefit interstate commerce.[3] Although the phrase "use or damage" sounds in terms of easement, we believe that this language is not so restrictive as to

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[2] Some support for appellants' contention is found in an early case dealing with the constitutionality of what is now the Federal Power Act, where the Court stated, "[a] careful reading of the act . . . shows that navigation is the predominant idea of Congress." *Alabama Power Co. v. Gulf Power Co.*, 283 F. 606, 619 (M.D.Ala., 1922).

[3] We do not find it necessary to determine if the recreational areas by and of themselves benefit interstate commerce. Our interpretation of § 814 is that it only requires that the waterway improvement benefit interstate commerce and that the recreational areas be found to be an accessory thereto.

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prevent the taking of a fee interest by the licensee.[4] If a recreational area can be considered a work appurtenant or accessory to a dam or reservoir, jurisdiction is present.

Section 803 of the Federal Power Act[5] provides that "the project adopted . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway . . . and for other beneficial public uses, including recreational purposes." The Supreme Court has held that the "objective of protecting 'recreational purposes' means more than that the reservoir created by the dam will be the best one possible or practical from a recreational viewpoint," *Udall v. Federal Power Commission*, 1967, 387 U.S. 428, 437, 87 S.Ct. 1712, 1717, 18 L.Ed.2d 869.

Section 2.7, Title 18, Code of Federal Regulations (1975) states that the commission expects a licensee to assume, among others, the following responsibilities:

> "(a) To acquire in fee and include within the project boundary enough land to assure optimum development of the recreational resources afforded by the project. To the extent consistent with the other objectives of the license, such lands to be acquired in fee for recreational purposes shall include the lands adjacent to the exterior margin of any project reservoir plus all other project

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[4] *Cf. Chapman v. Public Utility District No. 1 of Douglas Co., Wash.*, 9 Cir., 1966, 367 F.2d 163; *Oakland Club v. South Carolina Public Service Authority*, 4 Cir., 1940, 110 F.2d 84.

[5] All licenses issued under this subchapter shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval. 16 U.S.C., § 803(a).

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lands specified in any approved recreational use plan for the project.

"(b) To develop suitable recreational facilities upon project lands and waters and to make provisions for adequate public access to such project facilities and waters and to include therein consideration of the needs of physically handicapped individuals in the design and construction of such project facilities and access."

[1] While it is true that the regulations only go to the policy of the Federal Power Act and do not *ipso facto* confer jurisdiction, we can not be blind in our interpretation of 16 U.S.C., § 814 to the obvious policy behind the Act. In light of the policy evidenced in the federal regulations and the Federal Power Act itself, we conclude that recreational areas are properly considered as "appurtenant or accessory" to a dam and reservoir.

[2] If the licensee has the power to condemn lands for recreational areas at all, it has the right to do it in federal court. We are of the opinion that the SRA, as licensee, is authorized under 16 U.S.C., § 814 to condemn lands in fee for recreational areas in a federal district court.

Was Recreational Site # 9 Within the Scope of the Original Toledo Bend and Reservoir Project?

Having disposed of the jurisdictional issue, we move to the merits of the case.

The first issue is whether Recreational Site # 9 is a separate and distinct project from the original Toledo Bend Dam and Reservoir Project.

In support of their position the appellants allege the following facts:

(1) The intention of the SRA that the recreation and dam projects be separate is shown by the definition of

the term project in the original basic contract between the SRA of Louisiana and Texas which provides "that 'project' shall not include any recreational facilities . . . incidental to the construction and operation of said Toledo Bend Dam and Reservoir."

(2) The ownership and control of the dam and reservoir is vested in the combined SRA of Texas and Louisiana while the recreation areas are owned and controlled by each state separately.

(3) The location of the sites were never certain until May 10, 1967, the date of formal adoption by the SRA, being until then only recommended.

Appellee SRA, on the other hand, contends that the dam, reservoir and recreation construction was all one vast project and that the land was expropriated in an orderly fashion, accomplished over many years due to the large scale of the project.

The three-man commission and special master relied, *inter alia*, on the following facts to arrive at their conclusion that the taking of appellants' property for Site # 9 was within the scope of the original project:

(1) The project was a long range undertaking and Site # 9 had been proposed since the early period of the project.

(2) The 1960 Constitutional amendment establishing the SRA provided that the "Authority may acquire, develop and provide recreational facilities for the use of the public."

(3) Site # 9 was included on the first maps drawn in 1961 and was submitted as a proposed site to the Federal Power Commission in 1964.

(4) All expropriation suits for both the dam and recreation areas were brought by the same authority in an orderly fashion with the recreational sites taken last.

(5) All revenues of the project, including those from

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recreational uses, are pledged to repay revenue bonds borrowed to pay for the entire project.

The SRA, as licensee of the Federal Power Commission, is exercising its eminent domain power pursuant to 16 U.S.C., § 814, the last sentence of which prescribes that the "practice and procedure" in any eminent domain action in the federal district court "shall conform as nearly as may be with the practice and procedure" in a similar action in the state courts in which the land is located.[6]

The Louisiana Constitution, of course, provides that private property shall not be taken except after just and adequate compensation is paid, LSA-Const. Art. 1, § 2. The measure of compensation is governed by LSA-R.S. 19:9 which provides:

> In estimating the value of the property to be expropriated, the basis of assessment shall be the value which the property possessed before the contemplated improvement was proposed, without deducting therefrom any amount for the benefit derived by the owner from the contemplated improvement or work.[7]

[3] Federal common law provides for basically the same measure of compensation as does Louisiana law. *See United States v. Reynolds*, 1970, 397 U.S. 14, 16, 90 S.Ct. 803, 805, 25

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[6] Although the wording of § 814 appears to govern only procedural law and not any substantive law, there is authority to the contrary. *See Grand River Dam Authority v. Grand—Hydro*, 1948, 335 U.S. 359, 374, 69 S.Ct. 114, 121, 93 L.Ed. 64; *Central Nebraska Public Power & Irr. District v. Harrison*, 8 Cir. 1942, 127 F.2d 588, 589 (*semble*). We do not indicate any view on this point since we find no conflict between Louisiana and Federal substantive law.

[7] *See also* LSA-C.C. art. 2633; *State, Dept. of Highways v. Trippeer Realty Corp.*, La. 1973, 276 So.2 315, 319; *Shreveport Traction Co. v. Swara*, 133 La. 900, 63 So. 396 (1913); *Opelousas G. & N. E. Ry. Co. v. St. Landry Cotton Oil Co.*, 118 La. 290, 42 So. 940 (1907); *Louisiana Ry. & Navigation Co. v. Xavier Realty*, 115 La. 328, 39 So. 1, 6 (1905); *State, Dept. of Highways v. Port Properties, Inc.*, La.App.1975, 316 So.2d 749, 755; *State v. Johnson*, La.App.1962, 141 So.2d 54, 56.

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L.Ed.2d 12; *United States v. Miller*, 1943, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336; *Shoemaker v. United States*, 1893, 147 U. S. 282, 304-05, 13 S.Ct. 361, 392-93, 37 L.Ed. 170. Thus, it is clear that under both Louisiana law and federal law a landowner is not entitled to any enhanced value to his property attributable to the public project, which makes the condemnation necessary. The question in the instant case then is reduced to whether the taking of appellants' property for the construction of Recreational Site # 9 was a part of the original Toledo Bend Dam and Reservoir Project or a distinct and separate project. If the taking of the recreational site is a part of the original Toledo Bend Dam and Reservoir Project, the landowners will not be entitled to any enhancement of value caused by the construction of the Toledo Bend Dam and Reservoir.

A legal test devised to determine this situation, known as the "scope-of-the-project" test, was stated by a unanimous Court in *United States v. Miller*, 1943, 317 U. S. 369, 376-77, 63 S.Ct. 276, 281, 87 L.Ed. 336, as follows:

> If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public movement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.
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> The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were

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> not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities.

The test has been declared by the Louisiana Court of Appeals to be the applicable law in situations similar to the case at bar. *See State, Dept. of Highways v. Port Properties, Inc.*, La.App., 1975, 316 So.2d 749, 756-57; *State, through Dept. of Highways v. Martin*, La.App. 1967, 196 So.2d 63, 67.

[4] The Supreme Court recently reaffirmed the validity of the "scope-of-the-project" test and refined it, declaring that there was no requirement that the land ultimately taken be actually specified in the original project plans but only that it be shown that during the course of the planning it became evident that the land would probably be needed for public use, *United States v. Reynolds*, 1970, 397 U. S. 14, 21, 90 S.Ct. 803, 25 L.Ed.2d 12. The Court has also examined that it is not enough that it became evident within the confidential circles of government planning that certain property would be taken. It must also be evident to the public that a given tract might be taken for the project, *United States v. 2,353.28 Acres of Land, Etc., State of Fla.*, 5 Cir., 1969, 414 F.2d 965, 968.

In *United States v. Crance*, 8 Cir., 1965, 341 F.2d 161, a case similar to the case at bar,[8] the Court found that the government's taking of recreational sites which had not been proposed at the outset of the project was still probably within the scope-of-the-project and therefore, the landowner was not entitled to any enhancement. In *Crance, supra*, at 164-65, the Court stated:

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[8] *Crance* was not brought under the Federal Power Act as was the instant case since in *Crance* the United States was the condemnor.

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> Neither the fact that a line on a map tentatively projecting the reservoir boundary at the Crance location nor the fact that other recreational sites were approved prior to the selection of the Crance property would justify application of a different and higher standard of evaluation to the Crance property. To hold, in effect, on a project of this type that simply because this particular tract of land was not delineated on a map at the time of appropriation of funds for the project by Congress, it had been excluded, would be giving undue weight to the proposed diagram of the reservoir plan. Actually, there is no practical way to absolutely delineate with finality the areas abutting the reservoir line at the inception of the project which would be most suitable for recreational purposes. Extensive engineering studies must first go into the planning for the dam and reservoir. Moreover, the fact that the proposed perimeter of the reservoir was changed from the boundary depicted by the map that existed at the time of congressional authorization after subsequent engineering study demonstrates this very problem.
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> The dam and reservoir are the more important aspects of the project and their space requirements in the instant situation necessitated the dislocating of four hundred families. Not until the reservoir lines are finalized, can there be a practical final determination as to the number and location of the necessary recreational sites.
>
> The significant factor here is that this project contemplated recreational areas from its very inception and certainly property lying beyond a perimeter of the reservoir would probably be incorporated for recreational purposes if the land acquired for the reservoir alone was not also sufficient for recreational utilization. Since the Crance property abutted the reservoir line, it was within the sphere of probable acquisition for recreational use.

While we do not necessarily adopt the rather broad statement in *Crance* that property for a recreational site would be within the scope of the project simply because it abutted the reservoir line, we cite it to show that the project scope is not to be narrowly interpreted.

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[5] In the case at bar, Recreational Site # 9 was included on the first maps drawn in 1961, was submitted as a proposed site to the Federal Power Commission in 1964, and remains a site today. The appellants argue that the site was subject to change until it was finally adopted in 1967. However, the undisputed fact remains that the site was never changed and was made final nine months before the appellants bought the property.

As with any test that deals with probabilities, the test is resolved by applying one's best judgment to the facts at hand. From the facts adduced before the Commission, we cannot say that their finding that there was only one project was clearly erroneous.

Were Appellants Entitled to Rely on the Louisiana Public Records Doctrine?

[6] Appellants' final argument is that since a description of the land to be expropriated for Recreational Site # 9 was not recorded in the Parish records then by virtue of LSA-R.S. 9:2721[9] they are protected against any claim arising outside the public records. They cite *McDuffie v. Walker*, 125 La. 152, 51 So. 100 (1909) and *Kinchen v. Kinchen*, La. App. 1970, 244 So.2d 316 for the proposition that one who, upon faith on the public records, purchases real estate, the record title to which stands in the name of his vendor, is entitled to be protected in his purchase against any claims arising outside the public records. The Court in *Kinchen, supra*, at 318, declared the rule to be:

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[9] § 2721. Filing in office of parish recorder

No sale, contract, counter letter, lien, mortgage, judgment, surface lease, oil, gas or mineral lease or other instrument of writing relating to or affecting immovable property shall be binding on or affect third persons or third parties unless and until filed for registry in the office of the parish recorder of the parish where the land or immovable is situated; and neither secret claims or equities nor other matters outside the public records shall be binding on or affect such third parties.

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> The rule in McDuffie is based on the fundamental premise that public policy requires *stability in the titles* to real property to the end that marketability thereof will not be impaired and property not be taken out of commerce. To achieve this goal, the law prescribes one test for the marketability of real property, namely, the public records. With this concept in view, our jurisprudence establishes that acquisition of *clear title* to immovable property can be defeated only by knowledge afforded by the public records or by a successfully proferred allegation of fraud. (Emphasis added.)

Again, appellants' argument must fail. The question is not whether their title can be defeated, for they admit the superior power of the SRA to condemn and take the land; the only question is whether the appellants were given "just compensation." Appellants' claim against the SRA has nothing to do with title to the land but only with the price they received for it.

[7] We have been cited to no laws, nor have we found any, that require a condemnor to place a description of the land he proposes to condemn in the Parish records. In condemnation proceedings when enhancement is an issue the only requirement is that the probability that the land may be taken shall be publicly disclosed. *See United States v. 2,353.28 Acres of Land*, 5 Cir., 1969, 414 F.2d 965, 968.

In the instant case the appellants had actual notice that the land they desired to purchase lay within a recreation area.[10]

For the reasons hereinabove stated, the judgment of the District Court is

Affirmed.

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[10] The appellants opine that they were bound by a "purchase agreement" before they discovered that their desired land was in a recreational area. But the record reveals that the purchase agreement was contingent on delivery of a good and merchantable title. The appellants paid for and accepted title to the land five months after they learned that the land lay in a recreation area.

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STATE OF LOUISIANA, THROUGH THE SABINE RIVER AUTHORITY

versus

LLOYD L. LINDSEY, et al.,

No. 13,906

United States District Court for the Western District of Louisiana

May 9, 1974

OPINION

HUNTER, Judge

On July 3, 1968, the State, through the Sabine River Authority, filed suit to expropriate various tracts of land lying within the vicinity of the Toledo Bend Dam and Reservoir project.

Pursuant to Rule 71A, Federal Rules of Civil Procedure, the Court referred the issue of just compensation to a three-man commission, with a special master appointed as Chairman of the Commission. There were many expropriations. This is the only remaining controversy concerning those referred to the Commission. On April 24, 1969, the Commission issued its report containing findings of fact made by the entire Commission and conclusions of law issued by the Chairman of the Commission. Those findings and conclusions and objections by defendants are before us for review in accordance with Rule 53(e)(2), Federal Rules of Civil Procedure.

Our role in this review is limited by Rule 53(e)(2):

> "The court shall accept the master's findings of fact unless clearly erroneous."

The District Court does not have the right to reconsider,

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weigh and evaluate evidence to arrive at its own conclusions. *United States v. Merz, et al*, 376 U. S. 192, 84 S.Ct. 639, 11 L.Ed. 2d 629 (1964); 8 A.L.R. Feb. 180. As Judge Dawkins stated in *State of Louisiana Through the Sabine River Authority v. Carter*, 293 F.Supp. 1171, 1173 (W.D. La. 1968):

> "We are of the opinion that it is *not* our function, exquisitely and by way of 'nit picking' to rehash and reweigh the evidence. All that must appear is that there was substantial evidence to support the Commission's evidentiary findings, and that its awards were not 'clearly erroneous.' Rousseaux, et al. v. United States of America, 394 F.2d 123 (5 Cir. 1968); Evans v. United States, 326 F.2d 827 (8 Cir. 1964); Buena Vista Homes, Inc. v. United States, 281 F.2d 476 (10 Cir. 1960); 276 F.2d 264 (2 Cir. 1960).

The crucial issue before the Commission was whether or not the taking of Park Site 9 was part of the original project within the meaning of La. R.S. 19:9 and La. Civil Code Article 2633. These statutes provide:

> La. R.S. 19:9 "In estimating the value of the property to be expropriated, the basis of assessment shall be the value which the property possessed before the contemplated improvement was proposed, without deducting therefrom any amount for the benefit derived by the owner from the contemplated improvement or work."

> La. Civil Code 2633: "In estimating the value of the property to be expropriated, the basis of assessment shall be the true value which the land possessed before the contemplated improvement was proposed, and without deducting therefrom any amount for the benefit derived by the owner from the contemplated improvement or work."

If the property subject to the taking was part of the original project, then defendants are not entitled to the enhanced value caused by the Toledo Bend Dam and Reservoir. If the prop-

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erty was not part of the original project, then enhancement value becomes part of the compensation due to the landowner.

The main authority upon which the Commission relied was the United States Supreme Court decision of *United States v. Miller*, 317 U. S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943). The rule was stated:

> "If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.
>
> "The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities." 376 U. S. at 376-377.

We have examined the record and have studied the findings and conclusions of the Commission. We find there is substantial evidence to support those findings and conclusions. The Commission concluded that:

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> "in this case the Sabine River Authority has proven that the taking of Site 9, including defendants' property, was a part of the original project, and the defandants are therefore not entitled to enhancement in value caused by the construction of the Toledo Bend Dam and Reservoir,"

and submitted a valuation of $2,430.54.

COSTS

The Commission also concluded that court costs should be assessed against the defendants, relying upon Louisiana Civil Code Article 2638 and La. R.S. 19:12:

> "Louisiana Civil Code Article 2638: "If a tender be made by any corporation of the true value of the land to the owner thereof, before proceeding to a forced expropriation, the costs of such proceedings shall be paid by the owner."
>
> La. R.S. 19:12: "If a tender is made of the true value of the property to the owner thereof, before proceedings by a forced expropriation, the costs of the expropriation proceedings shall be paid by the owner."

The evidence established that prior to trial plaintiff offered defendants $10,001.00 for the property. The law is clear that defendant-landowners must bear the costs if such a tender is made prior to trial. The Commission was not clearly erroneous in assessing costs.

CONCLUSION

We accept the Master's findings and conclusions. An appropriate judgment should be submitted forthwith.[1]

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[1] We have heretofore noted that insofar as we know all other cases have been disposed of without too much controversy and hope that counsel will continue to make every effort to adjust this controversy.

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THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this the 9th day of May, 1974.

/s/ Edwin F. Hunter, Jr.

United States District Judge

Filed
May 10, 1974

• • • • • • • •

STATE OF LOUISIANA, THROUGH THE

SABINE RIVER AUTHORITY

versus

LLOYD L. LINDSEY, ET AL.,

No. 13,906

RULING OF SPECIAL MASTER

May 12, 1970
(nunc pro tunc as of April 24, 1969)

On July 3rd, 1968, the State of Louisiana, through the Sabine River Authority of the State of Louisiana, filed suit to expropriate from the defendant, Lloyd L. Lindsey, et al., various tracts of land lying within the vicinity of the Toledo Bend Dam and Reservoir project. The Court, in accordance with Rule 71A of the Federal Rules of Civil Procedure, referred the issue of just compensation to a three-man commission, with this special master appointed as chairman of said commission. The commission, acting upon the basis of the order as originally filed in these proceedings, prepared a report which contained findings of fact made by the entire commission and conclusions of law made by the chairman of the commission.

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By order entered nunc pro tunc on May 11, 1970, the Court revised its original order dated the 28th day of June, 1968, establishing this Commission and in place of the single commission presided over by an attorney at law as chairman, the Court named the chairman as a special master and directed that the special master render independent conclusions of law relating to matters which must be decided in order to determine the just compensation due to the defendants in these proceedings.

This special master acting as chairman of the three-man commission, appointed in accordance with Rule 71A of the Federal Rules of Civil Procedure, determined all legal questions presented to the commission, concurred in the findings of fact reached by the entire commission and determined and drafted the conclusions of law set forth in the commission's report submitted in these proceedings on April 24th, 1969.

For the foregoing reasons, this special master adopts the conclusions of law as set forth in the report of the Sabine River Authority Land Commission filed in these proceedings on April 24, 1969.

This report is submitted nunc pro tunc as of April 24, 1969, this 12th day of May, 1970.

/s/ Sydney B. Nelson

Special Master

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STATE OF LOUISIANA, THROUGH THE
SABINE RIVER AUTHORITY

versus

LLOYD L. LINDSEY, ET AL.,

No. 13,906

REPORT OF THE SABINE RIVER AUTHORITY LAND COMMISSION

April 24, 1969

On July 3rd, 1968, the State of Louisiana, through the Sabine River Authority of the State of Louisiana, filed suit to expropriate 18.28 acres of land owned by the defendants, Lloyd L. Lindsey, Ruth Rhodes Lindsey, Velma G. Dunn, Edward L. Dunn and Ralph McCollister, and named other defendants who might have had a claim to the ownership of the property. Additionally, the Sabine River Authority seeks to obtain 8.94 acres of land originally expropriated for the reservoir and then leased back to the prior owner. This land is referred to hereafter as the "leaseback" property. The subject property is described on the exhibit attached hereto.

The necessity of the taking was contested, but decided by the court adversely to the landowners' position. In accordance with Rule 71A of the Federal Rules of Civil Procedure, the Court referred the issue of just compensation to this three-man commission. The Commission submits this report of its findings of fact and conclusions of law.

The following facts were stipulated:

1. The plaintiff is seeking to expropriate the subject

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property including timber located thereon, reserving to defendants all minerals and mineral estate in perpetuity, together with right of ingress over, through and across the land for the purpose of exploring, developing, mining and marketing said minerals.

2. The procedural rules or laws of the United States apply to these proceedings, but that the substantative laws of Louisiana apply.

3. The plaintiff will pay all taxable costs of Court in these proceedings assuming that the award is larger than the amount of the offer and that such costs would include a reasonable fee for a reasonable number of expert witnesses.

4. Legal interest is to accrue to defendants after the reading and signing of the judgment.

5. Title to the subject property shall pass from the defendants to the plaintiff automatically upon the depositing by plaintiff into the Registry of the Court for the benefit of the defendants the just and adequate compensation awarded by this Court and Commission presiding over these proceedings; that this shall have no effect upon the right of either the plaintiff or the defendants to file objections to the findings of the Commission presiding over these proceedings, to take an appeal to the United States District Judge, United States Court of Appeals for the Fifth Circuit and/or the right of either party to apply to the United States Supreme Court for a writ or writs of certiorari and review and that the defendants may withdraw said just and adequate compensation from the Registry of the Court after it has been deposited by the plaintiff pending the hearing on any objections, rehearings, new trials, appeals and further proceedings in connection herewith.

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EFFECT OF INCREASED VALUE CAUSED BY THE PROJECT

The effect of increased value caused by the project was the subject of much debate by the parties, and was developed in considerable detail in the trial of this proceeding. Although these expropriation proceedings are conducted in the United States District Court, the substantive law of Louisiana is applicable. In support of its position that the defendant landowners should not be given the benefit of any enhancement in value which was caused solely by the State of Louisiana and Texas spending money to construct the Toledo Bend Dam and Reservoir Project, plaintiff cites the following Louisiana statutes:

> La. R.S. 19:9: "In estimating the value of the property to be expropriated, the basis of assessment shall be the value which the property possessed before the contemplated improvement was proposed, without deducting therefrom any amount for the benefit derived by the owner from the contemplated improvement or work."
>
> La. Civil Code 2633: "In estimating the value of the property to be expropriated, the basis of assessment shall be the true value which the land possessed before the contemplated improvement was proposed, and without by the owner from the contemplated improvement or work."

Plaintiff argues that the enhancement in value was caused solely and entirely by the construction of the project.

In opposition to the plaintiff's position, the defendant landowners urge that this Commission correctly applied the law to the facts in the case of Sabine River Authority versus International Paper Company, Civil Action No. 13,246 of the United States District Court for the Western District of Louisiana, Shreveport Division, and that a similar ruling is required in this proceeding. In the *International Paper Com-*

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pany case, the Commission cited with approval the following authorities:

United States v. Miller, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336 (1943):

> "If a distinct tract is condemned in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by the factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement."

ORGEL, ON VALUATION UNDER EMINENT DOMAIN, (1953), Volume 1, Section 99, Page 427:

> "Insofar as the factual basis of the decisions may be determined from the opinions, the cases fall into three general classifications: First, those in which the land taken was marked for use in the project from the beginning; second, cases in which the land taken was not within the original scope of the project, but was needed for expansion or for purposes which might be regarded as incidental to the project; third, cases in which the general location of the project is fixed, but the exact location or the extent thereof is uncertain. In general, in those cases falling in the first group, no enhancement in value is allowed, and in cases involving the second and third factual classifications enhancement in value due to proximity to an established or definitely planned improvement is allowed."

Plaintiff contends that since this case is controlled by the substantive law of Louisiana, the *Miller* case should not be

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considered. However, the *Miller* case has been cited with approval of Louisiana courts and the rationale is clearly applicable. Eg., *State of Louisiana, through the Department of Highways v. Martin*, 196 So.2d 63 (La. App. 3rd 1967). Plaintiff further contends that even if the principles of law set forth by this Commission in the *International Paper Company* case are correct, the additional facts presented in this case warrant a conclusion that the subject property which is sought for recreational purposes was part of the Toledo Bend Reservoir Project within the meaning of Section 9, Title 19, of the Louisiana Revised Statutes.

The defendant landowners emphasize Article 4, Section 15 of the Louisiana Constitution, Civil Code Article 2628, and the cases interpreting these statutory provisions which require that just compensation be paid to a landowner upon the involuntary taking of his land for public use. These laws are as follows:

> "Section 15. No ex-post facto law, nor any law impairing the obligation of contracts, shall be passed; nor shall vested rights be divested, unless for purposes of just public utility, and for just and adequate compensation previously paid."

> "Art. 2628. In all cases, a fair price should be given to the owner for the thing of which he is dispossessed."

Both parties have cited numerous authorities supporting their positions. The case of *United States of America v. 172.80 Acres of Land*, 350 F2d 957 (C.A. 3, 1965) presents a factual situation similar to that posed in this proceeding. There the Court stated:

> "It is clear that the new public improvement increased the value of the Totten land. Absent the reservoir, the highest use of the property was for farming and rural residence. But as a result of that public improvement it acquired new value for waterfront residences and cot-

tages and for recreational use under private proprietorship."

After thus stating the issue, the legal principles were set forth as follows:

"Legal principles applicable to this case are stated in Miller v. United States, 1942, 317 U.S. 369, 63 S.Ct. 276, 87 L. Ed. 336, also a controversy in eminent domain over value enhancement resulting from the very project for which the property in suit was condemned. The Court ruled that where a public project was so planned and described by the government from the outset as to disclose a probability that a particular tract or area would be required for the project somewhat later, any enhancement of value between that disclosure of probable future need and subsequent condemnation of a particular tract should not be included in the condemnation award for that property. The Court reasoned that such 'enhancement' reflected speculative judgment as to what the government would soon pay for the land rather than use value to a private purchaser. In a subsequent case, the Court described such an increase in value as 'a hold-up value, not a fair market value.' United States v. Cors, 1949, 337 U.S. 325, 334, 69 S.Ct. 1086, 1091, 93 L. Ed. 1392. See also United States v. 158.76 Acres of Land, etc., 2d Cir. 1962, 298 F2d 559, 560, 92 A.L.R. 2d 766.

"At the same time the Miller case discussed those distinguishable situations in which land near a public project, but not indicated at the outset as probably to be included therein, is genuinely enhanced in market value by the neighboring public development. 'Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity.' 317 U.S. at 376, 63 S.Ct. at 281. The basic issue here is within which of the categories described in the Miller opinion the present situation belongs."

This Commission must decide whether or not the taking of Park Site 9 was part of the contemplated improvement within the meaning of La. R.S. 19:9 and La. Civil Code Article 2633.

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In making this determination, the principles announced in each of the foregoing cases is helpful, but finally the question resolves into an issue of fact. For the reasons hereinafter set forth, we conclude that in this case the Sabine River Authority has proven that the taking of Site 9, including defendants' property was a part of the original project, and the defendants are therefore not entitled to enhancement in value caused by the construction of the Toledo Bend Dam and Reservoir.

Facts supporting the conclusion that the taking of defendants' property for Site Number 9 was part of the original project are as follows:

(1) The conception and implementation of the project was a long-range undertaking. In 1954, the Sabine River Compact between Louisiana and Texas was approved by the State of Louisiana and in 1955, a memorandum of agreement was entered into between the two states to apply for a $150,000 loan for a feasibility study. It was not until May 11, 1964, that work upon the dam site actually began. However, in 1961, the engineering firm of Barnard & Burk had been retained to select recommended recreational areas and during that year they selected Site Number 9 as a proposed site.

(2) In the 1960 amendment to the Louisiana Constitution in Article 14, Section 45, authorizing, ratifying and approving the creation of the Sabine River Authority, it was provided that one of the purposes was for providing recreation, and specifically stated:

> "Authority may acquire, develop and provide recreational facilities for the use of the public."

(3) At Appendix 2-56 of Exhibit P-9 is a map dated October, 1961, prepared by Barnard & Burk which shows Site 9 as a proposed recreational area.

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(4) On March 4, 1964, the Sabine River Authority of Louisiana designated Site 9 and other sites as recreational areas and in conjunction with the Sabine River Authority of Texas, submitted to the Federal Power Commission, Supplement No. 1, Report on Master Plan for Reservoir Recreational Development, prepared by Forrest and Cotton, Inc. (Exhibit P-9). This recreational development plan designated Site 9 as one of the public recreational areas.

(5) A Federal Power Commission permit was required in order to dam the navigable Sabine River, and the original permit was issued jointly in the Sabine River Authority of Louisiana and the Sabine River Authority of Texas under Project Number 2305 (Exhibit P-4). The subsequent order of the Federal Power Commission approving the recreational use plan was also issued to the two authorities jointly and under Project Number 2305.

(6) In expropriating property for the project, the two authorities proceeded in an orderly fashion taking the property at the dam site first, then that property which was to be inundated, and the recreational sites whilch were needed last, were taken last. All suits to acquire land in Louisiana were initiated by the Sabine River Authority of Louisiana, whether the land was for the lake bed or for recreational park sites.

(7) Funds for the total project came from various sources:

(a) $15,000.00 came from an ad valorem tax on Louisiana land as authorized by Article 14, Section 45, to the Louisiana Constitution.

(b) $15,000.00 was borrowed by the Sabine River Authority of Texas from the Texas Water Development Board.

(c) Each authority sold $15,000.00 in revenue bonds to be repaid by the sale of electricity.

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(d) An additional $4,000,000 of revenue bonds were sold by the Sabine River Authority of Texas, and the Sabine River Authority of Louisiana acquired an additional $4,000,000 from the General Funds of the State of Louisiana.

(e) Proceeds from leases of the "leaseback" area along the shoreline to property owners adjoining the reservoir, interest earned on the revenue bonds and funds from the Bureau of Outdoor Recreation were obtained by the Sabine River Authority of Louisiana for use in acquiring and developing recreation sites. "Leaseback" lands were originally purchased with joint funds and the interest from revenue bonds was interest on joint funds which were used to purchase recreational sites.

(8) Although the purchase of recreational sites was funded separately by the two authorities, joint funds were used to clear the lake bed in front of recreational sites. The evidence showed that much more private land would have to be acquired on the Louisiana side of the project than on the Texas side, and therefore very practical reasons existed for the two States to require that each party pay for recreational sites on their respective sides of the reservoir.

(9) Although it is contemplated that revenue from the recreational sites will be used to maintain and improve these sites, all revenues of the project, including those from recreational uses, are pledged to repay the abovementioned revenue bonds.

(10) The original Federal Power Commission permit issued October 14, 1963, in Articles 34 and 35 required the licensees to provide the public free access to the project waters and required the licensees to construct, maintain, and operate recreational facilities at the project.

Defendant relies strongly upon this Commission's decision in the *International Paper Company* case. In that case, we listed eight factual findings supporting the defendant's

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position, each of which are urged by the defendant herein. Those findings, and our conclusions in regard thereto in this proceeding, are as follows:

> (1) Although it was envisioned that certain recreation sites would be selected, the location of particular sites to be taken was not designated until 1964.

Although Site Number 9 was not officially designated until March 4, 1964, it is apparent from evidence in this proceeding that it was one of the sites selected as early as October, 1961.

> (2) The original plan for the Toledo Bend Dam and Reservoir submitted to the Federal Power Commission in 1962 did not specify location of recreational sites, and it was as a result of a requirement of the Federal Power Commission that a recreational plan was submitted in 1964.

It is true that the recreational plan was submitted in accordance with a requirement of the Federal Power Commission, but the evidence in this case clearly demonstrates that overall recreational planning was part of the project independent of the Federal Power Commission requirement.

> (3) The original recreational plan only designated 16 sites, but subsequent changes have occurred which envision 18 or 19 sites.

Site 9 involved in this case was one of the 16 sites originally designated.

> (4) The recreational plan designating the sites in question was finally approved by the Federal Power Commission on April 21, 1967.

No additional comment.

> (5) Article 48 of the Federal Power Commission License requires that a revised recreational plan be sub-

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> mitted within five years from the date of the April 21, 1967 order. This revised plan is to include proposals for any additional land needed for recreational purposes.

In the opinion of the Commission, the selection of additional sites at a subsequent date would clearly fall within the category of lands not within the scope of the project from the time the Sabine River Authority was committed to it, and thus they are not taken for the contemplated improvement. This is, however, not the case as to Site 9 involved in this proceeding.

> (6) Money used in purchasing the inundated lands was placed in a joint account for the benefit of Louisiana and Texas, whereas the State of Louisiana and the State of Texas acted separately in raising funds for the acquisition of recreational sites.

It is true that each authority acted separately in raising funds for recreational areas, but the sources of funds used in purchasing Louisiana recreational sites were derived in part from joint resources as discussed above, and even the funds used jointly were raised by the two authorities from separate sources except for the revenue bonds.

> (7) Title to land which is inundated for the reservoir is to be held jointly by the State of Louisiana and the State of Texas, assuming such joint ownership is constitutional. However, title to the recreational areas is to be held solely by the State in which the property lies.

It should be noted that all suits to acquire land on the Louisiana side of the Sabine River, whether for land to be inundated or to be used as public recreational sites were filed by the same plaintiff, Sabine River Authority of Louisiana, and that ultimate title to the land depends upon an agreement between the two authorities and upon the applicable state laws.

> (8) Use of the reservoir itself is to be jointly con-

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> trolled by the two states, but control of the recreational areas rests with the individual states in which the land is located.

No additional comment.

In this case, just as in the *International Paper* case, the issue is whether or not the defendants' land is being taken as part of the initial Toledo Bend Dam and Reservoir project, or whether the project was planned and implemented and, as a separate undertaking, the particular park sites were selected for recreational development. In the *International Paper* case, the Commission concluded that the plaintiff failed to prove that the particular park sites were part of the initial project. However, in this case, additional evidence has been presented relative to Park Site 9 which establishes that defendants' property was part of the initial Toledo Bend Dam and Reservoir project.

In support of the defendants' position, it should be noted that Mr. Calvin T. Watts, Executive Vice President of the Sabine River Authority, State of Louisiana, testified that the Sabine River Authority of Louisiana had responsibility for Louisiana recreational sites and the Sabine River Authority of Texas had responsibility for Texas recreational sites, and the two recreational programs were separate from the beginning. (Deposition of Calvin T. Watts, September 21, 1968, pages 27-28). However, taken as a whole, we conclude that Mr. Watts' testimony supports the conclusion that although recreational sites were the separate responsibility of each state, the selection and utilization of recreational sites were an integral part of the Toledo Bend Dam and Reservoir Project.

Defendants urge that the title to their land is protected by the public records doctrine as set forth in Louisiana Revised Statute 9:2721, which provides:

"No sale, contract, counter letter, lien, mortgage, judg-

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> ment surface lease, oil, gas or mineral lease or other instrument of writing relating to or affecting immovable property shall be binding on or affect third persons or third parties unless and until filed for registry in the office of the parish recorder of the parish where the land or immovable is situated; and neither secret claims or equities nor other matters outside the public records shall be binding on or affect such third parties. Acts 1950, 2nd Ex.Sess., No. 7, §1."

They, in effect, urge that this statute as interpreted by the Louisiana Supreme Court in *McDuffie v. Walker*, 125 La. 152, 51 So. 100 (1910) and subsequent cases prevent taking of their property without payment of the enhanced value caused by the project since there was nothing of record indicating that this property would be taken for part of the Toledo Bend Dam and Reservoir project.

The public records doctrine set forth in the foregoing statute is not applicable to rights established by legislative act such as La. R.S. 19:9 and Civil Code Article 2633. The Louisiana Second Circuit Court of Appeal in *Wright v. DeFatta*, 142 So. 2d 489 (1962) stated:

> "It is clear that the purpose of the law of registry is to allow persons to deal with immovable property without going beyond the records to discover hidden defects or equities imposed upon the property by private individuals. The public policy of this state, as enunciated in many cases is to encourage the commercial flow of title and rights to immovable property. Registry is, of course, the method of giving notice to third parties of transactions affecting realty. This doctrine is clearly not applicable to a municipal ordinance. There are no "third parties" to such an ordinance. To the contrary, all parties are bound by the provisions of a legislative act which has been legally adopted."

For the foregoing reasons, we conclude that plaintiff proved that the property belonging to defendant in Recreational Site No. 9 was taken for part of the contemplated improvement within the meaning of La. R.S. 19:9, and there-

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fore defendants are not entitled to payment for increased value of their property caused by the reservoir.

OWNERSHIP OF SUBJECT PROPERTY

Although some issue arose as to the ownership of the subject property, affidavits and deeds were filed into evidence which indicate that Lloyd L. Lindsey, Ruth Rhodes Lindsey, Velma G. Dunn and Edward L. Dunn own an undivided one-half interest in the property and that Rolfe H. McCollister owns the other undivided one-half interest. A curator ad hoc was appointed to represent other defendants, but no evidence was adduced to indicate that they retained any interest in the property. For that reason, whenever the term "defendants" is used in this report, we have reference to the above-named individual defendants.

VALUATION

The evidence clearly establishes that but for the lake or reservoir, the subject property would have the highest and best use as timberland. Since defendants submitted no evidence of timberland values, we must accept as true the testimony of the plaintiff's witnesses as to timberland values and thus assign the property the higher of the two appraisals, or a value of $2,071.00. In addition to this, defendants are entitled to a refund of the amount originally paid for the leaseback acreage of $336.23 and $23.31 for the timber upon the leaseback land, or a total of $2,430.54.

TAXATION OF COSTS AND EXPERT WITNESS FEES

The evidence established that prior to trial, the plaintiff offered defendants $10,001.00 for the property which is the subject of this litigation. In support of its argument the court costs should be assessed against the defendants, plaintiff cites the following statutes:

Louisiana Civil Code Article 2638: "If a tender be made

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by any corporation of the true value of the land to the owner thereof, before proceeding to a forced expropriation, the costs of such proceedings shall be paid by the owner."

La. R.S. 19:12: "If a tender is made of the true value of the property to the owner thereof, before proceeding to a forced expropriation, the costs of the expropriation proceedings shall be paid by the owner."

Each of these statutes uses the mandatory language "**shall**" be paid by the landowner. Since the substantive laws of the State of Louisiana apply, the court costs are therefore assessed against the defendants.

SUBMISSION REPORT

The undersigned Commissioners do hereby submit this report and the findings of fact contained herein for filing with the Clerk, United States District Court, Western District of Louisiana, Shreveport Division, and request that notice of filing be mailed to all parties. Simultaneously with the filing of this report, a copy hereof has been mailed to counsel of record for all parties. The transcript of the proceedings, evidence, and other exhibits have previously been filed.

The Commission respectfully requests that this report be submitted to Judge Ben C. Dawkins, Jr., for his review. Submitted on this the 24th day of April, 1969.

/s/ Sydney B. Nelson
Chairman

/s/ S. C. Fullilove, Jr.
Member

/s/ E. S. Walker
Member

Filed
April 24, 1969

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUN 1 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1315

LLOYD L. LINDSEY, ET AL.,
Petitioners,

VERSUS

STATE OF LOUISIANA, THROUGH
THE SABINE RIVER AUTHORITY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Leesville, Louisiana 71466

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 75-1315

LLOYD L. LINDSEY, ET AL.,

Petitioners.

VERSUS

STATE OF LOUISIANA, THROUGH
THE SABINE RIVER AUTHORITY,

Respondent.

Respondent's Brief in Opposition to
Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE:

The factual statement of the case is thoroughly set out in the opinion rendered by the Fifth Circuit, which is reported at 524 F. 2 934, and is Appendix B of the petition for the writ. It is respectfully pointed out that the Fifth Circuit's factual finding was the same as that of the Commission and Special Master, as well as that of the United States District Judge.

These factual findings include the fact that Recreational Site No. 9 had been in the development plans from the commencement of the project in 1961, had never been changed or removed, and was made final as a recreational site nine months before petitioners purchased the property.

Petitioners claim, in their statement of the case, that they never had any official notice that the land in question would be taken for public purposes. However, the facts are (as pointed out by the Fifth Circuit) that petitioners had specific and actual knowledge that the land would be condemned for use as a recreational site some five months *before* they bought the property.

ARGUMENT ON THE QUESTIONS PRESENT:

(A) JURISDICTION:

The question of jurisdiction for the federal court to hear this case was first raised by the Fifth Circuit during oral arguments.

During the proceedings to acquire all the land for the Toledo Bend Project, over one hundred suits were filed condemning land which was eventually flooded, and almost a score of suits were filed to acquire recreational land. All were filed in the United States District Court under the provisions of the Federal Power Act, and more specifically, 16 U.S.C. ¶ 814.

Title 16 U.S.C. ¶ 814 reads as follows:

> "When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion

structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000."

It is respectfully submitted that the recreational site in this case is certainly a work "appurtenant or accessory" to the dam and reservoir.

This is clearly shown by the fact that the State of Louisiana, in order to obtain the license in the first place, had to make definite commitments to build the recreational sites.

The cases of *Feltz v. Central Nebraska Public Power & Irr. Dist.*, 8th Cir. 1942, 124 F. 2 578, *Chapman v. Public Utility Dist. No. 1 of Douglas Co., Wash.*, 9th Cir., 1966, 367 F. 2 163, and *Court in Oakland Club v. South Carolina Public Service Authority*, 4th Cir. 1940, 110 F. 2 84, all consider this question peripherally, but adequately to allow the court to conclude that a licensee has the power of eminent domain in federal court to condemn lands in fee for recreational purposes, so long as they are appurtenant or accessory to the reservoir.

This is further shown by a reading of Section 2.7, Title 18, Code of Federal Regulations (1975).

This sets forth that the Federal Power Commission expects licensees, specifically, "--To acquire in fee and include within the project boundary enough land to assure optimum development of the recreational resources of the project."

It is respectfully submitted that jurisdiction for this case lies in the federal courts.

(B) ENHANCEMENT OF VALUE:

The primary issue in this case is whether or not the landowner is entitled to be paid the value of the land at its pretaking use as timberland, or the value, as enhanced by the presence of the reservoir, as lakeshore property.

The Louisiana law is plainly to the effect that the landowner is not entitled to any enhanced value attributable to the improvement. This can be seen in *State, Department of Highways v. Tripper Realty Corp.* (La. 1973), 276 So. 2 315; *State, Department of Highways v. Johnson* (La. App. 1962), 141 So. 2 54; *Shreveport Traction Co. v. Svara* (La. 1913), 63 So. 396.

It may also be seen in L.S.A. - R.S. 19:9 and Civil Code, Article 2633, which govern the measure of compensation to be awarded.

As can further be seen, *United States v. Reynolds*, 1970, 397 U.S. 14, 90 S. Ct. 803, 25 L. Ed. 2 12, *United States v. Miller*, 1943, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336, and *Shoemaker v. United States*, 1893, 147 U.S. 282, 13 S. Ct. 361, 37 L. Ed. 170, all provide for the same basic measure of compensation as does Louisiana law.

Under both the Louisiana law and the federal law, if the recreational site was part of the original Toledo Bend Dam and Reservoir Project, the landowners are not entitled to the enhanced value.

The rule used to make this determination is known as the "scope-of-the-project" test, and is accepted in both the Federal Courts (*United States v. Miller*, supra) and the Louisiana state courts (see: *State, Department of Highways v. Port Properties, Inc.*, La. App. 1975, 316 So. 2 749).

The basic determination to be made under this test is a factual one. At all stages of the proceedings in this matter, the finder of fact has applied this test and found adversely to the landowner.

The Commission and Special Master found that the acquisition of the land for the recreational site was within the scope of the project.

The District Judge agreed with this finding and conclusion of the Commission.

The Court of Appeal, in a very thorough opinion, also agreed.

It is respectfully submitted that those determinations below are correct and that the landowner is not entitled to claim an enhanced value of the land.

(C) PUBLIC RECORDS DOCTRINE:

Finally, the petitioners claim that they are protected by the Public Records Doctrine of *McDuffie v. Walker*, 125 La. 152, 51 So. 100 (1909), and are entitled to the enhanced value of the property thereunder.

This cannot be seriously argued, for, as the Fifth Circuit points out, petitioners *knew* five months before they purchased the property that it would be taken by the Sabine River Authority. They purchased anyway and, thus, cannot be allowed now to argue that they relied on the public records.

Moreover, the question in this case is *value*, rather than *title* which is the issue addressed by the public records doctrine.

CONCLUSION:

It is respectfully submitted that the courts below have decided correctly the issues discussed above.

It is respectfully submitted that, for the foregoing reasons, this petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing brief have been forwarded by mail, postage prepaid, to Mr. James S. Holliday, Jr., attorney for petitioners, P.O. Box 2706, Baton Rouge, Louisiana 70821, on this the 24th day of May, 1976.

Simeon Christie Smith III

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